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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 BERTHA KELLY and
12 ANNETTE MCKEE,

No. CIV.S-04-1873 WBS DAD PS

13 Plaintiffs,

14 v.

FINDINGS AND RECOMMENDATIONS

15 RICHARD C. MITCHELL,

16 Defendant.
_____ /

17 This matter came before the court on April 22, 2005, for a
18 Status (Pretrial Scheduling) Conference. Plaintiffs, proceeding pro
19 se, appeared on their own behalf. Attorney Margaret Kemp-Williams
20 appeared specially on behalf of defendant Richard C. Mitchell,¹ who
21 is a resident of New York, solely for the purpose of advising the
22 _____

23 ¹ No named defendant is discernible from the face of
24 plaintiffs' difficult to decipher complaint, which is captioned as a
25 "United State[s] Attorney General Notice of Constitutional Challenge
26 24-133." However, the captions of the "Memorandum of Law," "Notice
of Motion of Constitutional Challenge," and "Notice of Constitutional
Challenge" filed along with the complaint when plaintiffs initiated
this action indicate that Mr. Mitchell is the only named defendant.

1 court of Mr. Mitchell's position that service of process has yet to
2 be completed.

3 Following the initial status conference on February 18,
4 2005, at which time plaintiffs failed to appear,² the court issued an
5 order continuing the status conference to April 22, 2005, at 11:00
6 a.m. That order provided plaintiffs thirty (30) additional days to
7 complete service of process upon defendant Mitchell, even though
8 plaintiffs had filed their complaint well over one hundred twenty
9 (120) days prior. See Fed. R. Civ. P. 4. The order forewarned
10 plaintiffs that failure to effectuate service of process and file
11 proof of such service with the court within the required time likely
12 would result in a recommendation of dismissal. See id.

13 On March 7, 2005, plaintiffs filed a "proof of service"
14 indicating that they served "a copy of Constitutional Challenge 24-
15 133 Federal Criminal Proceeding P 17.1" upon defendant Mitchell "by
16 placing said copy [in the] certified return receipt registered mail."
17 Normally, this manner of service would appear to be proper under
18 Federal Rule of Civil Procedure 4(e)(1), which allows service upon an
19 individual "pursuant to the law of the state in which the district
20 court is located," and California Code of Civil Procedure § 415.40,
21 which allows service "on a person outside this state ... by sending a
22 copy of the summons and of the complaint to the person to be served
23 by first-class mail, postage prepaid, requiring a return receipt."

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25 ² At the initial status conference, Jim Labor, who identified
26 himself as a friend of plaintiffs' family, appeared to observe the
status conference and was permitted to speak.

1 However, if service on a nonresident is made pursuant to
2 California Code of Civil Procedure § 415.40, the "proof of service
3 shall include evidence satisfactory to the court establishing actual
4 delivery to the person to be served, by a signed return receipt or
5 other evidence[.]" Cal. Code Civ. Proc. § 417.20(a) (emphasis added).
6 Plaintiffs have provided no such evidence of actual delivery. See
7 Bolkiah v. Superior Court (Bijan Fragrances, Inc.), 74 Cal. App. 4th
8 984, 1001, 88 Cal. Rptr. 2d 540, 551 (1999) ("Proof of service by mail
9 on out-of-state defendants must nevertheless strictly comply with the
10 requirements of Code of Civil Procedure section 417.20, subdivision
11 (a)."). Therefore, service is void even though defendant may have
12 actual notice of the action. See 3 Witkin, California Procedure (4th
13 Ed. 1996) Actions § 933 (citing cases).

14 Moreover, plaintiffs' proof of service does not indicate
15 that defendant Mitchell was served with a summons along with the
16 complaint as required.³ Of course, the rules require that "[a]
17 summons shall be served together with a copy of the complaint." Fed.
18 R. Civ. P. 4(c)(1). Indeed, neither the court's docket nor the
19 court's file indicate that a summons was ever issued in this case.
20 It is plaintiffs' responsibility to have a summons issued. Fed. R.
21 Civ. P. 4(b) ("Upon or after filing the complaint, the plaintiff may
22 present a summons to the clerk for signature and seal.").

23 /////

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25 ³ Approximately 120 pages of various documents are attached to
26 plaintiffs' proof of service. However, none of those documents
indicate that defendant was served with a summons.

1 There being no indication that defendant Mitchell has been
2 served with a copy of the summons and complaint as required, the
3 undersigned finds that plaintiffs have failed to complete service of
4 process. Dismissal of plaintiffs' complaint is therefore
5 appropriate.

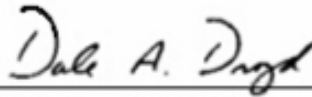
6 Additionally, while the precise nature of plaintiffs'
7 claims are unclear, the allegations of the complaint and plaintiffs'
8 comments at the status conference strongly suggest that plaintiffs
9 may be attempting to challenge a New York state court child custody
10 order. If that is the case, there would almost certainly be no basis
11 for federal jurisdiction. See Ankenbrandt v. Richards, 504 U.S. 689,
12 703 (1992) (holding that domestic relations exception to federal
13 jurisdiction "divests the federal courts of power to issue divorce,
14 alimony, and child custody decrees"); D.C. Court of Appeals v.
15 Feldman, 460 U.S. 462, 482-86 & n.16 (1983) (holding that district
16 courts do not have jurisdiction to review state court decisions or
17 claims "inextricably intertwined" with the merits of the state court
18 determination).

19 Accordingly, IT IS HEREBY RECOMMENDED that this action be
20 dismissed without prejudice for failure to compete service or process
21 in a timely fashion.

22 These findings and recommendations are submitted to the
23 United States District Judge assigned to the case pursuant to the
24 provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after
25 being served with these findings and recommendations, any party may
26 file written objections with the court and serve a copy on all

1 parties. Such a document should be captioned "Objections to Findings
2 and Recommendations." The parties are advised that failure to file
3 objections within the specified time may waive the right to appeal
4 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th
5 Cir. 1991).

6 DATED: April 28, 2005.

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DALE A. DRCZD
9 UNITED STATES MAGISTRATE JUDGE

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